DIGEST OF IMPORTANT DECISIONS

EDITED BY

ALFRED ROLAND HAIG.

ADMIRALTY.

Cases selected by HORACE L. CHEYNEY.

DEMURRAGE.

1. *Exceptions to Political Consequences.*

Libellant's ship proceeded to a Chilian port for cargo under a charter party, which provided for demurrage at a certain rate, "the act of God, political occurrences, fire, . . . excepted." Civil war was progressing in Chili. The port was blockaded by the *de facto* government, and the agent of the charterers was unable to procure cargo because the sellers would not deliver, for fear of being compelled to pay a second export duty in case the government fell. *Held*, there being no actual *vis major* encountered by the charterers, to prevent a loading, that they were not within the exceptions of the charter party, and were liable for demurrage: McLeod *v.* 1600 Tons of Nitrate of Soda, District Court, Northern District of California, MORROW, D. J., April 18, 1893, 55 Fed. Rep., 528.

NEGLIGENCE.

2. *Who Liable for, in a Peculiar Case—Pilot.*

C chartered a schooner to take on cargo, without guarantying any depth of water, nor agreeing to put a pilot on board to carry her out to sea, nor reserving any control over the vessel. The master of the schooner employed a tug to take her out to sea, and, upon the request of C or his agent, a pilot was put on the tug. The schooner was stranded on a bar, and lost, for want of proper pilotage. *Held*, that the pilot was the servant of the tug, and not of C, and that C could not be held liable because the pilot was employed upon his insistence or request, or because the pilot was the captain of a boat in the employ of C: "The Martin Kalbfleisch," United States Circuit Court of Appeals, Second Circuit, April 18, 1893, 55 Fed. Rep., 336.

CARRIERS AND TRANSPORTATION COMPANIES.

Cases selected by OWEN WISTER.[1]

CARRIERS OF GOODS.

1. *Unlawful Discrimination in Rates.*

In an action by a shipper to recover damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up,

[1] During the absence of Mr. WISTER the cases in this Department are selected by the editors.

in justification of the lower rates, a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defence would practically emasculate the law.

Nor can the lower rate be justified on the ground of the cost of mining coal to the company in whose favor the rate is made, and any evidence as to the cost of mining is irrelevant: Union Pacific Ry. Co. *v.* Goodridge, Supreme Court of the United States, BROWN, J., May 15, 1893, 13 Sup. Ct. Rep., 970.

GARNISHMENT.

2. *Carriers Subjected to.*

A railroad company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Such a garnishment, at the suit of a stranger to the contract of carriage, while it remains in force, excuses the company from delivering the property to the shipper or consignee: Cooley *v.* Minn. Ry. Co., Supreme Court of Minnesota, DICKINSON, J., May 22, 1893, 55 N. W. Rep., 141.

NEGLIGENCE.

3. *Railroads—Injuries to Passengers.*

It is not negligence for a passenger to leave a railroad car at the rear platform.

Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform: McDonald *v.* Ill. Cent. R. R. Co., Supreme Court of Iowa, GRANGER, J., May 20, 1893, 55 N. W. Rep., 102.

COMMERCIAL LAW.

Cases selected by FRANCIS H. BOHLEN.

CONTRACT.

1. *Damages for Breach of—Prospective Profits.*

Plaintiffs contracted with defendant to solicit orders for its electric protective system, and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated; plaintiffs agreeing to maintain such apparatus, and serve defendant's customers according to the contract between defendant and such customers, and to receive as compensatian 50 per cent. of the rentals. The contract was for three years. *Held*, that where defendant, after procuring several customers, refused to go on with the contract, though the profits were wholly prospective, plaintiffs were entitled to damages.

Evidence of the cost of running such business was competent, in estimating the amount of damages, to show whether or not any profits were made.

The contract provided that, at the expiration of the three-year term, plaintiffs should have an option to renew it for five years. *Held*, that, there being no evidence that such option had been converted into a contract, it was error to allow damages for profits which might have accrued during the additional term of five years: Ramsey *v.* Holmes Electric Protective Co., Supreme Court of Wisconsin, PINNEY, J , May 2, 1893, 55 N. W. Rep., 391.

2. *Damages—Prospective Profits—Instructions.*

The contract in this case required removal of a large quantity of solid rock on the margin of a navigable stream. To blast this rock into the river would be less expensive than to remove it to a greater distance. There was evidence, however, that blasting into the river might obstruct navigation. *Held*, that an instruction that no one had the right to obstruct navigation was not abstract in view of such evidence, nor objectionable in assuming that blasting would necessarily cause an obstruction.

An instruction that plaintiffs could not recover any profits for rock which they had intended to blast into the river, if any, and that plaintiffs had no right to blast rock into the river, was properly refused as assuming that the rock so blasted would cause an obstruction to navigation.

An instruction that profits which would certainly have been realized but for defendant's default were recoverable, but not those which were speculative, contingent, probable, or remote, was faulty in use of the word "probable," since profits reasonably probable might be recovered.

And so, also, an instruction confining plaintiffs to the recovery of profits which were "certain," reasonable certainty alone being required: Tenn. & C. R. R. Co. *v.* Danforth, Supreme Court of Alabama, STONE, C. J., April 27, 1893, 13 So. Rep., 51.

3. *Offer and Acceptance—Sale of Land.*

Plaintiff agreed with defendant to sell him certain land for $23,500 at any time within the next nine months, giving him, in effect, an option for that time. Improvements on the property having been burned, defendant accepted the option, and at the same time, and as a part of the same transaction, demanded the insurance money on the property destroyed by fire, claiming that it should be applied on the purchase price. Plaintiff refused to deed the property on such condition, but offered to make the deed on payment of the $23,500, and this defendant refused. Plaintiff did not tender a deed of the property at this time, but later, having discharged a mortgage on the property with the insurance money, tendered a deed for $23,500, which defendant refused to accept. *Held*, that there was no completed contract of sale: Clark *v.* Brown, Supreme Court of Wisconsin, ORTON, J., May 23, 1893, 55 N. W. Rep., 401.

CONSTITUTIONAL LAW.

Cases selected by WILLIAM STRUTHERS ELLIS.

POLICE POWER.

1. *Fourteenth Amendment—Fencing of Railroads—Damages—Due Process of Law.*

A State statute (General Laws Minnesota, 1877, c. 73) which gives damages to a landowner for the expense and inconvenience of watching cattle to keep them from going upon a railroad track running through his land, which the company has failed to fence as provided by the terms of its charter, is within the police power of the State, and is not in conflict with that portion of the Fourteenth Amendment to the Federal Constitution which secures to all persons the equal protection of the laws, even though, by the general law of the State, penalties and damages are given only for direct injuries sought to be prevented. The allowance of damages for the diminution of value in the farm, resulting from the failure of the company to fence its roads and construct proper cattle guards, is not a taking of the railroad company's property without due process of law: Minn. & St. L. Ry. Co. *v.* Emmons, Supreme Court of the United States, FIELD, J., May 10, 1893, 13 S. C. Rep., 870.

2. *Manufacture and Sale of Intoxicating Liquors—State Regulations—Due Process of Law—Discrimination.*

The South Carolina Act of December 24, 1892, prohibits the manufacture and sale of intoxicants within the State, except under certain conditions. These are, in general, the appointment by the Governor of a State commissioner, and the appointment by "county boards of control" of county "dispensers." The purchase of all liquors, etc., is to be made by the commissioner and distributed among the county "dispensers," who, in turn, sell to the public. By no other means can intoxicating beverages be procured: *Held*, That there is no inherent right of a citizen to sell intoxicating liquors by retail, and that the above statute is, in its general scope and purpose, within the police power of the State. The Act, in view of the Act of Congress of August 8, 1890, providing that any liquors imported into a State shall immediately become subject to its police laws, even in the original package of importation, is not in contravention of the Federal inhibition against State impairment of the obligation of contracts, or against the levying of any imposts or duties on imports or exports, etc. Nor is the Act contrary to the provisions of the Fourteenth Amendment forbidding any State to discriminate against citizens of other States or of the United States. Nor is the Act in contravention of the Fifth Amendment, forbidding the taking of property without due process of law and the taking of private property for public use without just compensation: Cantini *v.* Tillman, Circuit Court, District of South Carolina, SIMONTON, D. J., March 1, 1893, 54 Fed. Rep., 969.

CRIMINAL LAW.

Cases selected by ROBERT J. BYRON.

EVIDENCE.

1. *Res Gestæ.*

On a prosecution for murder committed while resisting arrest, a remark of a bystander to an officer that "there is the man that did it" (*i. e.*, committed the offence for which the arrest was being made) is part of the *res gestæ*, and admissible in evidence: State *v.* Duncan, Supreme Court of Missouri, SHERWOOD, J., May 16, 1893, 22 S. W. Rep., 699.

INTERSTATE EXTRADITION.

2. *Trial for Different Offence.*

A fugitive from justice, surrendered by one State to another, may be tried in the State to which he is returned for any other offence than that specified in the requisition for his rendition; and in so trying him, against his objection, no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied; Lascelles *v.* State of Georgia, 13 S. C. Rep., followed: State *v.* Glover, Supreme Court of North Carolina, SHEPHERD, C. J., May 2, 1893, 17 S. E. Rep., 525.

REMOVAL TO SUPREME COURT OF UNITED STATES.

3. *Writ of Error instead of Habeas Corpus.*

Where one imprisoned under a sentence of a State court claims that such sentence violates his rights under the Constitution or laws of the Unites States, it is the general rule, and better practice, in the absence of special circumstances, to require him to seek a review of the judgment by writ of error, instead of resorting to a writ of habeas corpus: *Ex parte* Frederich, Supreme Court of the United States, JACKSON, J., April 24, 1892, 13 S. C. Rep., 793.

EQUITY.

Cases selected by ROBERT P. BRADFORD.

INJUNCTION.

1. *Trade-mark.*

A merchant may acquire an exclusive right to the use of packages of the shape, style and dimensions in which he exposes his goods for sale, with the emblems, devices and other distinctive features delineated or impressed upon them, and the name adopted to represent their contents; and a rival merchant will be enjoined from using similar packages, where the resemblance in such that it is calculated to, and does, in fact, deceive the ordinary buyer making his purchases under the ordinary conditions prevailing in the particular traffic, although there is no single point of imitation which could of itself be regarded as adequate ground for equitable relief: Fischer *v.* Blank, Court of Appeals of New York, MAYNARD, J., May 2, 1893, 33 N. E. Rep., 1040.

LIENS.

2. *Mechanic's Liens—Foreclosure—Equity Jurisdiction—Federal Courts.*

Defendant, in a contract for improvements, agreed to give plaintiff, at the latter's option, either a mortgage or a mechanic's lien on the twenty acres of land on which the improvements were placed. Plaintiff, having at the proper time filed in the probate court a statement for a lien as required by the Alabama statute, filed a bill to foreclose the same, attaching thereto the statement, which described the land as "contiguous to" the city of Sheffield. A foreclosure decree having been entered by default, defendant sought to have it set aside on the ground that under the Alabama statute the lien was limited to one acre, unless the land was situated within the limits of a city or town; that the bill did not show the property to be within such city or town, and did not describe any particular acre to which the decree could attach. *Held*, that this ground was untenable, as it was competent for the parties to extend by contract the area of the lien, and as the bill did not affirmatively show that the land was not within a city or town.

The fact that a State statute gives an action at law to enforce a mechanic's lien will not deprive the Federal Courts of jurisdiction to foreclose such liens by bill in equity, for the question whether legal or equitable remedies shall be adopted in the Federal Courts is determined, not by the State practice or legislation, but by the nature of the case, and the foreclosure of a mechanic's lien is essentially an equitable proceeding: Sheffield Furnace Co. *v.* Witherow, Supreme Court of the United States, BREWER, J., May 10, 1893, 13 Sup. Ct. Rep., 936.

TRUSTS.

3. *Separate Use—Married Woman—Powers of.*

A devise of land to a woman "to have and to hold . . . to her sole and separate use, free from the interference or control of her husband, and to her heirs and assigns forever," in the absence of anything to show a different intent, creates a separate use trust, giving the devisee the equitable title and not the fee, and she cannot incumber the land; MacConnell *v.* Wright, 150 Pa., 275, distinguished. Hays *v.* Leonard, Supreme Court of Pennsylvania, WILLIAMS, J., May 22, 1893, 26 Atl. Rep., 664, 32 W. N. C. 402.

4. *Voluntary Declaration—Power of Revocation.*

Where an aged man, addicted to drink, and with an hereditary tendency to insanity, in fear of impending insanity created a trust in all his property, whereby he was to receive the entire income and the trustee only a small commission, and reserved to himself only the right of testamentary disposition, the trust thus created must be deemed irrevocable in the absence of any showing of fraud practised on him to persuade him to execute the instrument: Reidy *v.* Small, Supreme Court of Pennsylvania, DEAN, J., MITCHELL, J., dissenting, May 8, 1893, 26 Atl. Rep., 602; 32 W. N. C., 240, 154 Pa., 505.

MUNICIPAL CORPORATIONS AND PUBLIC LAW.

Cases selected by MAYNE R. LONGSTRETH.

CHINESE EXCLUSION.

1. *Due Process of Law.*

Under the Chinese Exclusion Acts, due process of law requires that the United States, when prosecuting, should show that the defendant is unlawfully in this country, and not that the defendant should show a right to be here: United States *v.* Long Hop, District Court S. D. of Alabama, TOULMIN, D. J., February 8, 1893, 55 Fed. Rep., 58.

CUSTOMS DUTIES.

2. *Classification—Hat Trimmings.*

Under the Tariff Act of March 3, 1883 (22 Stat., 488), ribbons made of silk, or of which silk is the component material of chief value, and which the jury found are commonly and principally used in trimming hats, were dutiable at 20 per cent. *ad valorem*, as "hat trimmings" under Schedule M, and not at 50 per cent., under Schedule L, unenumerated silk merchandise: Cadwallader *v.* Wanamaker, Supreme Court of United States, SHIRAS, J., May 15, 1893, 13 Sup. Ct. Rep., 279. See, also, Hartranft *v.* Langfeld, 125 U. S., 128.

3. *Classification—Metal Trimmings.*

Goods composed chiefly of metal, and known by the general name of "trimmings," though they have specific names to distinguish one from the other, and some of which are used exclusively, and the others chiefly, for the making and ornamenting of hats, bonnets and hoods, are dutiable at 20 per cent., under Schedule M, as trimmings for hats, etc., and not at 45 per cent. under Schedule C, as metal goods: Walker *v.* Seeberger, Supreme Court of United States, SHIRAS, J., May 15, 1893, 13 Sup. Ct. Rep., 981.

4. *Classification—Piece Goods—"Chinas" and "Marcellines."*

Piece goods, known as "chinas" and "marcellines," invoiced as such, and imported in rolls or folds, 18 to 31 inches wide and 75 to 125 yards long, and which the jury finds are "trimmings" chiefly used in making hats, are dutiable at 20 per cent., as trimmings under the tariff Act of March 3, 1883, and not at 50 per cent., under Schedule L, as unenumerated silk merchandise: Hartranft *v.* Meyer, Supreme Court of the United States, SHIRAS, J., May 15, 1893, 13 Sup. Ct. Rep., 982.

Dissenting opinion, by BREWER and BROWN, JJ., as to each of the above cases, 13 Sup. Ct. Rep., 983.

LABOR ORGANIZATION.

5. *Procuring Discharge of Non-union Laborer—Liability.*

A labor organization which refuses to admit a non-union man to membership, and informs his employers that in case he is any longer retained it will be compelled to notify all labor organizations of the city that their house is a non-union one, and thereby compels his discharge, is guilty of a wrongful act; and an action will lie against it by the non-

union man for the damages he has suffered in consequence of such discharge: Lucke *v.* Clothing Cutters' and Trimmers' Assembly, K. of L., of Baltimore, Court of Appeals of Maryland, ROBERTS, J., March 6, 1893, 26 Atl. Rep., 505.

TARIFF ACT.

6. *Construction—Words Used in a Trade Sense.*

A term, used in a tariff law, which has a general meaning as used by society at large, and also a special trade signification, is presumed to have been used by Congress in the trade sense, unless the contrary is shown. Hedden *v.* Richard, Supreme Court of the United States, SHIRAS, J., May 10, 1893, 13 Sup. Ct. Rep., 861.

PATENTS.

Cases selected by HECTOR T. FENTON.

ACTION FOR INFRINGEMENT.

1. *Jurisdiction of the Federal Courts.*

Under the Act of Congress of March, 1877, § 1, a corporation organised under the laws of another State cannot be sued for infringement in a State where it does business by a citizen of a third State; following Shaw *v.* Mining Co., 145 U. S., 444. Adriance *v.* McCormick Machine Co., Circuit Court Northern District of New York, WALLACE, J., October 13, 1892, 53 Fed. Rep., 287.

2. *Parties—Construction of Ambiguous Contract—License for Sale in Foreign Countries.*

Where the owners of certain patents conveyed to the plaintiff an exclusive license in specified parts of the United States, and also the exclusive right to build the patented devices for sale in Europe, and thereafter transferred to the defendants all their remaining right, title and interest in the patent subject to the rights of the complainant: *Held*, in an action by the licensee, that he may prosecute in his own name suit for infringement of the patent where the defendant is the owner of the legal title. *Held*, also, that the grant of a right to manufacture within the specified territory for sale to the foreign trade was a substantive grant and enforceable by injunction. *Held*, also, that evidence aliunde is admissible to explain the latent ambiguity in the contract, and that doubts apparent upon the face of the instrument must be resolved by the Court resorting, if necessary, to the rule that a grant expressed in doubtful words shall be construed most strongly against the grantor: Adriance *v.* McCormick Machine Co., Circuit Court N. D. Illinois, WOODS, C. J., March 24, 1893, 53 Fed. Rep., 288.

PATENTS FOR INVENTIONS.

3. *Sufficiency of Specification.*

The patent in suit was for a process of a novelty iron ware, the specification of which directed the use of any coloring matter that can

be made to remain mechanically suspended a short time in water. It appeared that the coloring matter could not be so mechanically suspended in water unless coarse ground. *Held*, that the specification was not defective in omitting to so state, for the reason that one skilled in the art would know that this result could only be obtained by the usual coarse ground material: Lalance *v.* Habermann, U. S. Circuit Court of Appeals, Second Circuit, WALLACE, LACOMBE and SHIPMAN, JJ., April 18, 1893, 53 Fed. Rep., 292.

4. *Action for Penalties for Wrongful Marking—Pleadings.*

Defendants were impleaded under Rev. Stat., § 4901, under an allegation that certain machines made, marked and advertised by the defendant were not covered by certain letters patent mentioned, or any other letters patent of that date or number. *Held*, that this allegation could not be expanded into a general allegation that the machines were unpatented so as to bring the case within the third clause of that section of the statute under which the burden is upon the plaintiff to show that the article marked patented was not covered by any patent, and that this burden of proof is not met by showing that the machine did not contain the invention covered by one patent which was marked upon the same, there being other patents also marked thereon. *Held*, also, that a person who marks as patented, under certain letters patent, the date and number of a machine which does not in fact contain the invention covered by said patent, is not guilty of violating either the first or second clauses of that section of the statute: Russell *v.* Newark Machine Co., District Court, Southern District of Ohio, SAGE, D. J., March 13, 1893, 53 Fed. Rep., 297.

PLEADING AND PRACTICE.

Cases selected by ARDEMUS STEWART.

PLEADING.

CONTESTED ELECTION.

1. *Parties—Joinder of Several as Respondents in One Petition.*

Under the Pennsylvania Act of 1874, providing that the parties to an election contest shall be the petitioners complaining of the election and the "person" returned as elected, contestants of an election need not file as many copies of their petition as there are persons elected on the contested ticket, where such persons are elected to the same office, or are chosen from the same district; it being sufficient to join them in one petition: Moock *v.* Conrad, Supreme Court of Pennsylvania, WILLIAMS, J., May 25, 1893, 26 Atl. Rep., 700; 32 W. N. C., 329.

PRACTICE.

CONTESTED ELECTION.

2. *Appealable Order.*

No appeal lies from an order refusing to quash a petition in a contested election case: Moock *v.* Conrad, Supreme Court of Pennsylvania, WILLIAMS, J., May 25, 1893, 26 Atl. Rep., 700; 32 W. N. C., 329.

RECORD ON APPEAL.

3. *Stenographer's Notes—Charge to Jury—Assignments of Error—Bill of Exceptions.*

The stenographer's notes do not become part of the record on appeal simply where the stenographer certifies to their correctness, but there must be an order of the court that they be written out and filed.

Prior to the introduction of court stenographers the judge was required, at the request of either party, to reduce his charge to writing at the time of delivery, and, when it was put on record, either party might assign error to any part of it, whether exceptions had been taken or not, a general exception to the charge being sufficient; or either party could submit particular points in writing, and require the judge to reduce his answers to writing and read them to the jury, and on the points and answers being filed they became part of the record for purposes of error. Since the introduction of stenographers, the charge, points and answers, written out by the stenographer and filed, become part of the record, and appellant may assign error to any part of the charge or answers to points without having excepted: Rosenthal *v.* Ehrlicher, Supreme Court of Pennsylvania, WILLIAMS, J., May 1, 1893, 26 Atl. Rep., 436; 31 W. N. C., 221; 154 Pa., 396.

To the same effect is Connell *v.* O'Neil, Supreme Court of Pennsylvania, MITCHELL, J., May 8, 1893, 26 Atl. Rep., 607; 32 W. N. C., 256; 154 Pa., 582.

4. *Bill of Exceptions—Powers of Court Stenographer—Exceptions to Evidence.*

A bill of exceptions to evidence is equally indispensable since the introduction of court stenographers as it was before, and, though noted by the stenographer, the granting of an exception is the act of the judge; and such stenographer can neither note an exception without the judge's direction, nor does his filing of his notes make them part of the record, an order of the judge being indispensable for such purpose.

To have an exception to evidence noted and allowed, it must be taken by the party, allowed by the judge, noted by the stenographer at his direction, set out in the bill, and personally examined by the judge to see if it is correct, and his signature affixed thereto to certify its correctness: Connell *v.* O'Neil, Supreme Court of Pennsylvania, MITCHELL, J., May 8, 1893, 26 Atl. Rep., 607; 32 W. N. C., 256; 154 Pa., 582.

To the same effect is Rosenthal *v.* Ehrlicher, Supreme Court of Pennsylvania, WILLIAMS, J., May 1, 1893, 26 Atl. Rep., 435; 32 W. N. C., 221; 154 Pa., 396.

PROPERTY.

Cases selected by WILLIAM A. DAVIS.

DOWER.

1. *Ante-nuptial Agreement Releasing Dower.*

In a suit for assignment of dower the evidence showed that com-

plainant's husband had died seised of real and personal estate. By an ante-nuptial agreement the complainant had agreed to take a certain sum payable two years after her husband's death in lieu of all her claims against his estate, which sum proved to be much less than she would have received as the widow of the decedent. *Held*, that the provision for the wife was so inadequate that it constituted no bar to dower in the absence of affirmative proof that when she signed the agreement she had notice of the extent of her husband's property, and of the effect of the agreement: Taylor *v.* Taylor, Supreme Court of Illinois, SCHOLFIELD, J., CRAIG, J., dissenting, January 19, 1893, March 24, 1893, 33 N. E. Rep., 532. See "Dower, and Ante-nuptial Release of Dower," 31 AMERICAN LAW REGISTER AND REVIEW (December, 1892), 832, *et seq.*

SPECIFIC PERFORMANCE.

2. *Mutuality of Contract—Option of Vendee—Feme Covert—Agent.*

An agreement to sell land at the option of the vendee is not rendered void, for want of mutuality, because the vendee was a feme covert, and the agent who contracted for her had no authority to bind her thereby; and on election and offer of performance by such vendee the contract will be enforced against the vendor: Yerkes *v.* Richards, Supreme Court of Pennsylvania, DEAN, J., March 27, 1893, 26 Atl. Rep., 221; 32 W. N. C., 286; 153 Pa., 646.

3. *Time of Essence of Contract.*

A purchased certain real estate, and in pursuance of the contract entered into possession of the property and made improvements thereon. The contract contained a provision that time should be of the essence of the contract. *Held*, that the circumstances of the case were not such as to make time the essence of the contract, and that a failure to perform at the day would not prevent the specific enforcement of the contract: Merriam *v.* Goodlett, Supreme Court of Nebraska, MAXWELL, C. J., March 16, 1893, 54 N. W. Rep., 686.

TORTS.

Cases selected by ALEXANDER DURBIN LAUER.

LIBEL.

1. *What Constitutes—Residence of a Citizen of the United States in Canada.*

A complaint for libel set out the following publication: "Missing millionaire McDonald located. McDonald, Southern Ohio manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada." *Held*, that, in view of the fact that many of our countrymen, who expatriate themselves under such circumstances in Canada, are frequently fugitives from justice (a matter of common knowledge, which the Court may judicially notice), this publication is capable of a libellous

interpretation, and, being properly pleaded, is good as against a demurrer: McDonald *v.* Press Pub. Co., Circuit Court, Southern District of New York, WALLACE, C. J., April 24, 1893, 55 Fed. Rep., 264.

2. *Words Libellous Per Se—Inuendo — Use of Word "Intimacy"—Publication Concerning Postal Official.*

Where words are such that the common understanding of mankind takes hold of them, and without difficulty applies to them a libellous meaning, an inuendo is not needed, and if used may be treated as surplusage. If the words used are of dubious import, and their meaning is averred by inuendo, the truth of the inuendo is for the jury; but the quality of the alleged libel, either simply or as explained by averments and inuendoes, is a question of law, and the Court is bound to instruct the jury as to whether the publication is libellous, assuming the truth of the inuendoes. If the publication be defamatory, malice is an inference of law.

A newspaper publication concerning a superintendent of mails, as follows: "Complaints from outside parties were sent to the department, one asking for his dismissal, on account of intimacy with a well-known local elocutionist," is *per se* libellous: Collins *v.* Dispatch Publishing Co., Supreme Court of Pennsylvania, STERRETT, J., January 3, 1893, 31 W. N. C., 316; 152 Pa., 187.

3. *Newspaper Criticism Concerning Public Official — Militia Officer.*

In an action against a newspaper for libelling a public officer, it is for the jury to determine whether or not the publication was substantially fair and accurate, whether the defendant had reasonable and probable cause to believe in the truth of the matter, and whether the proper inquiries were made, and care used in the statement of that believed to be true. If the jury find the publication justified on either of these grounds the verdict should be for the defendant.

An official in the performance of a public duty is amenable to public criticism in the newspapers, and if there be probable cause for their comments, the publication is not a libel, even if the statements be exaggerated and not strictly true in every respect. The effect of such exaggeration and sensational comment, as evidence of malice, is for the jury. A militia officer is a public official within this rule: Jackson *v.* Pittsburgh Times, Supreme Court of Pennsylvania, GREEN, J., January 3, 1893, 31 W. N. C., 389; 152 Pa., 406.

4. *Candidate for Nomination to Office—Privilege.*

The privilege of commenting on and criticising the acts of public men does not justify the publication in a newspaper of an article which falsely asserts that a candidate for a party nomination to Congress "sold out" and transferred his supporters to a rival candidate; and when the truth of the facts stated in the article is in issue the jury is properly instructed that the facts which gave rise to the comments must be proved substantially as alleged; that it is no defence that the writer, when he wrote, honestly believed in the truth of the charges, if the charges were

made recklessly, unreasonably, and without any foundation in fact; and that, in so far as the publication fell within the limits of criticism and comment, it was privileged, but in so far as it went beyond that the defence of privilege failed: Hallam *v.* Post Pub. Co., Circuit Court of the Southern District of Ohio, W. D., ACHESON, C. J., April 25, 1893, 55 Fed. Rep., 456.

5. *Privileged Occasion—Public Officials.*

A complaint in an action for libel alleged that defendant, who with two others constituted a town board of school trustees, before whom plaintiff's application for employment as a teacher was pending, filed his written protest before the board, objecting to plaintiff's employment in "false, malicious and libellous language," viz.: "For claiming wages not due her and making statements which, in my opinion, she knew to be false, in order to obtain them." *Held*, that the complaint was demurrable because it disclosed that the occasion was privileged, and the allegation that the language was false and malicious is not sufficient, but in such cases the complaint must further show that the defendant acted maliciously in publishing it: Henry *v.* Moberly, Appellate Court of Indiana, DAVIS, J., April 12, 1893, 33 N. E. Rep., 981.

See, also, as to publications concerning public officials and candidates for office, 32 AMERICAN LAW REGISTER AND REVIEW, (July, 1893), 670–676; 30 id. 556–565; Commonwealth *v.* Brown (Pa.), 31 W. N. C., 320.

6. *Reports of Commercial Agencies.*

A false publication by a commercial agency as to the solvency of a business firm is not privileged where the publication sheet is issued to all subscribers of the agency without regard to their being creditors of the firm. To publish "Mitchell, Smith & Co., of Sugar Loaf, Arkansas, assigned," is libellous *per se:* Mitchell *v.* Bradstreet Co., Supreme Court of Missouri, Division No. 2, BURGESS, J., May 2, 1893, 22 S. W. Rep., 358.

7. *Source of Information—Punitive Damages.*

In an action against a newspaper for publishing a libellous article received by it from a news agency, the jury were properly instructed that if they think that the fact that the article was received, in the ordinary course of business, from a reliable and unusually correct news agency, is sufficient to excuse the defendant from inquiry and delay before publication, punitive damages should not be given, but that, if they think that the defendant was guilty of reprehensible negligence in publishing the article without verification of its truth, then punitive damages may be given; Morning Journal Ass'n *v.* Rutherford, 2 C. C. A., 354, 51 Fed. Rep., 513, followed. Smith *v.* Sun Printing and Pub. Ass'n, Circuit Court of Appeals, Second Circuit, LACOMBE, C. J., April 18, 1893, 55 Fed. Rep., 240.

8. *Scandalous Rumors Concerning Private Individuals.*

It is no justification of the publication of a scandal concerning private individuals, not occupying a public position, or charged with any offence known to the laws, that the rumors to which reference was made

in the publication have been for some time floating about in the neighborhood, and are known to a number of persons: Commonwealth *v.* Place, Supreme Court of Pennsylvania, PAXSON, C. J., February 27, 1893, 32 W. N. C., 153 Pa., 314.

9. *Evidence.*

In an action for libel charging plaintiff with being "as big a rascal" as one M., evidence is not admissible to show what kind of a rascal defendant charged M. to be in the absence of any allegation to that effect in the complaint: Cassidy *v.* Brooklyn Daily Eagle, Court of Appeals of New York, PECKHAM, J., May 2, 1893, 33 N. E. Rep., 1038. Reversing 18 N. Y. Supp., 930.

WILLS, EXECUTORS AND ADMINISTRATORS.

Cases selected by MAURICE G. BELKNAP.

ADMINISTRATION.

1. *Jurisdiction of Federal Courts.*

An estate which is in course of administration in a State probate court is in *gremio legis*, and a Federal Court has no jurisdiction, on the filing of a bill by a citizen of another State against the administrator, to recover a share in the property, to take the administration of the estate out of the State Court, and itself make a decree of distribution, determining the rights of citizens of that State as between themselves. Its jurisdiction in such case is limited to determining and awarding the shares of citizens of other States: Byers *v.* McAuley, Supreme Court of the United States, BREWER, J., FULLER, C. J., and SHIRAS, J., dissenting, May 10, 1893, 13 Sup. Ct. Rep., 906.

WILLS.

2. *Bequest to Ecclesiastical Officer—Gift to Pastor of Church Not a Charitable Bequest.*

Testator, having bequeathed one-half of the residue of his estate to "the pastor of the St. John's R. C. Church of Altoona, Pa.," died before the statutory period necessary to sustain gifts to charitable uses had elapsed. *Held*, in the absence of any evidence, facts or circumstances tending to fasten upon the legatee a trust for religious or charitable uses, the bequest is to be considered as a personal gift or bequest to the person filling the office described, in his own right; and, therefore, is not affected by the death of the testator before the expiration of the period necessary to validate a charitable bequest: Hodnett's Estate, Supreme Court of Pennsylvania, STERRETT, C. J., May 8, 1893, 26 Atl. Rep., 623; 32 W. N. C., 302; 154 Pa., 485.

3. *Material Alteration at Request of Testatrix—Proof.*

A will which is materially altered by erasures after having been executed and published, will not be admitted to probate in its altered form, on the testimony of only one witness (a daughter), that she made the erasures at the request of testatrix: Simrell's Estate, Supreme Court of Pennsylvania, GREEN, J., May 8, 1893, 26 Atl. Rep., 599; 154 Pa., 604.

4. *"Or" Construed to Mean "And."*

Several legatees in a will having died, testator altered his will, which originally read, "I give and bequeath as follows," then mentioning the names of the legatees, by inserting after "as follows" the words "or their heirs," and adding the word "deceased" after the names of each of the legatees who were dead. The will was republished in this form. *Held*, that extrinsic evidence was admissible of the conditions under which the alteration was made, and that the word "or" will only be read as "and," and so become a word of limitation, where such construction would carry out the evident intention of the testator, and not where the effect would be to render one part of the sentence inoperative when such necessity was not apparent from the context: Gilmor's Estate, Supreme Court of Pennsylvania, THOMPSON, J., May 8, 1893, 26 Atl. Rep., 614; 32 W. N. C., 272; 154 Pa., 523.

5. *Power of Trustee to Continue Business of Testator.*

Where a testator authorizes and empowers the trustee named in his will to continue the business of the testator, and also authorizes him to sell any of his property, real and personal, and with the proceeds of such sale "to make such other investments, real and personal, and commence, conduct and carry on such other business for the benefit of the *cestuis que trustent* hereinafter mentioned as he may deem most advantageous," the trustee has power to sell only for a consideration for the purpose of investment and for the benefit of the trust: Young *v.* Weed, Supreme Court of Pennsylvania, THOMPSON, J. (MITCHELL, J., dissenting), April 17, 1893, 32 W. N. C., 297, 154 Pa., 316.